

Protest of) Date: July 14, 1992
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JON B. ROBINSON)
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Solicitation No. 623-4019-92) P.S. Protest No. 92-23

DECISION

Jon B. Robinson timely protests the contracting officer's determination that he is a nonresponsible bidder under solicitation no. 632-4019-92, issued by the St. Louis Transportation Management Service Center (TMSC) for the highway transportation of mail in a van with a minimum usable load capacity of 800 cubic feet from Carbondale to Cave In Rock, IL.

The solicitation was issued on February 28, 1992 with bid closing on March 31. Mr. Robinson's bid of \$41,792 per year was lowest of the 12 bids received. By letter of April 9, the TMSC requested information from Mr. Robinson necessary to make a responsibility determination. Among the items requested were the following:

- (1) a completed pre-award questionnaire (PS Form 5472) which asks for information concerning, among other things, other contracts in which the prospective awardee has been engaged in the carriage of mail in the last 5 years, the prospective awardee's assets and liabilities, and the equipment to be used in supplying the solicited service;
- (2) a short narrative of how Mr. Robinson would perform the service; and
- (3) a clarification of a suspected mathematical error in the bid worksheet (PS Form 7468-A) because the amounts listed in the various categories of the form exceeded the total of the bid.

On April 16, Mr. Robinson supplied the requested information which indicated, among other things, that he held "several contracts," identifying five by contract number. Mr. Robinson also corrected the mathematical error by reducing the hourly rate of

compensation to be paid employee(s) from \$11.11 per hour to \$8.54 per hour.^{1/}

By letter of April 16, the contracting officer found Mr. Robinson nonresponsive. The letter indicated the determination was based on the following factors:

- (1) three of Mr. Robinson's previous postal contracts had been terminated for default for poor service, two within the last year;^{4/}
- (2) Mr. Robinson was providing poor service on a current contract;
- (3) current and previous poor service was attributable to Mr. Robinson's failure to provide equipment and required backup equipment and these equipment problems stemmed from Mr. Robinson's weak financial condition as evidenced by his Chapter 11 reorganization and request for bimonthly payments on his contracts; and
- (4) Mr. Robinson's proposed resolution of the mathematical error in his bid reduced the hourly rate of compensation for drivers below the rate required by the applicable wage determination.

By letter of April 25, Mr. Robinson protested the contracting officer's determination. That letter was forwarded to this office for resolution. Pursuant to PM 4.5.5 a., contract award has been stayed pending the decision in this protest.

In his protest, Mr. Robinson states that he planned to provide the service with a gooseneck trailer with an 800 cubic foot box pulled by a pickup truck with a classification meeting the requirements of the lower wage determination for a light vehicle driver. Mr. Robinson also indicates that while obtaining the equipment necessary to provide the service through the above arrangement he would utilize a straight truck and absorb the difference in hourly rate of compensation under the wage determination. As to any funds necessary to operate the route, Mr. Robinson states that they will be accumulated at the end of an emergency contract which has expired.^{1/}

^{1/} The minimum hourly rate of to be paid employee drivers on postal highway transportation contracts is fixed by the Department of Labor pursuant to its authority under the Service Contract Act, 41 U.S.C. " 351 et seq., through wage determinations. See PS Form 7382. The wage determination applicable to the contract here provided for hourly compensation of \$11.11 for truck drivers (other than drivers of tractor trailer combinations whose minimum hourly rate was set at \$12.25) and \$8.54 for light vehicle drivers.

^{2/} The record reflects that only two contracts were terminated for default. The other was an emergency contract terminated on 24 hours' notice without indemnity.

^{3/} The record is not clear on this point. Presumably, Mr. Robinson will be able to accumulate funds because all necessary expenditures on the contract have been made and any remaining contract payments will be profit.

Mr. Robinson also alleges that the failure of the TMSC to award him this route reduces his ability to increase his revenue base to meet future obligations and that the failure is the product of "an ongoing conspiracy by some members" of the Postal Service attempting to cause him to lose his contracts. Lastly, Mr. Robinson states that he has not provided poor service and would match his performance record against that of any other "postal operation at the same level."

In his report, the contracting officer states that the Procurement Manual (PM) provides that in order to be determined responsible a contractor must have a good performance record. PM 3.3.1 b.3. The report includes information concerning the termination for default of two contracts (one in August of 1991 and one in May of 1991), the termination of an emergency contract on 24 hours notice, and poor performance on a current contract requiring a formal counseling session on March 18, 1992. The contracting officer also states that the PM provides that a contractor must have financial resources adequate to perform the contract. The report states that Mr. Robinson's liabilities are twice the amount of his assets and that Mr. Robinson's liquidity status has required him to request (and receive) contract payments on a 14-day as opposed to the standard 28-day pay cycle.

Lastly, the contracting officer indicates that Mr. Robinson's plan for meeting the vehicle requirements of the solicitation's specifications, in effect, made his bid nonresponsive since the solicitation requires the use of a van, not a gooseneck trailer, with cargo capacity of 800 cubic feet. Furthermore, with regard to Mr. Robinson's statement that the gooseneck trailer/pickup truck arrangement would meet the standards of the light vehicle driver classification of the applicable wage determination, the contracting officer notes that the wage termination defines a "light vehicle driver" as a driver of a motor powered vehicle with a nominal cargo capacity of 300 cubic feet or less.^{4/}

Discussion

The standard of our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the [requirements of the contract] with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

^{4/} Mr. Robinson has not submitted comments on the contracting officer's statement.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988.

PM 3.3.1 a. sets forth the reasons for responsibility determinations as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility....

PM 3.3.1 a. PM 3.3.1 e. requires: "[i]n the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1. To be determined responsible, a contractor must have, inter alia, financial resources adequate to perform the contract (PM 3.3.1 b.1.), a good performance record (PM 3.3.1 b.3.), and the necessary production...and technical equipment...or the ability to obtain them (PM 3.3.1 b.7.).

The contracting officer's determination of nonresponsibility in this case was not arbitrary and capricious and was based on substantial evidence. Recent unsatisfactory contract performance, evidenced by a default termination, can justify a determination of nonresponsibility. Package Express, Inc., P.S. Protest Nos. 87-57, 87-58, 87-64, July 27, 1987; Hunter L. Todd, P.S. Protest No. 85-78, October 18, 1985; Bathey Manufacturing Company, P.S. Protest No. 82-7, March 31, 1982. Although termination's for default in the distant past cannot be considered by a contracting officer, it is allowable to consider a termination within the recent past. Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988 (and protests cited therein). Mr. Robinson's default on two postal contracts within the year before the contracting officer's determination at issue here reasonably justifies a nonresponsibility determination. Id.

Because Mr. Robinson's termination's for default justified a nonresponsibility determination regarding his bid we need not decide whether the other bases offered by the contracting officer would justify his decision.

Mr. Robinson's allegation concerning "an ongoing conspiracy by some members" of the Postal Service to cause him to lose his contracts may be summarily resolved since it is not supported by the record. In order to establish that employees of the Postal Service are acting with bias, a protester must affirmatively establish with sufficient evidence that those individuals had a "specific and malicious intent to harm the protester...." Cimpi, supra. "Prejudicial motives will not be attributed ... on the basis of inference or supposition." I.C., Inc., P.S. Protest No. 86-06, April 25, 1986, quoting Rodgers-

Cauthen Barton-Cureton, Inc., Comp. Gen.Dec. B-220722.2, January 8, 1986, 86-1 CPD & 19. Mr. Robinson offers no evidence that the contracting officer or TMSC personnel acted with bias in determining him nonresponsible. Inferences or suppositions are insufficient to overcome the presumption that government personnel act in good faith in compliance with their duties. See Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988. The level of proof required to overcome the presumption of good faith has been described as "well-nigh irrefragable" and will not be sustained by inferences or speculation. See Gregory Lumber Co., Inc. v. U.S., 11 Cl. Ct. 489, 501 (1986) and case cited therein.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law